

REMARKS/ARGUMENTS:

The Examiner rejected claims 1-8 under 35 U.S.C. § 103(a) as being unpatentable over *Wilson* (US Patent 5,864,827, hereafter “*Wilson*”) in view of *Patterson Jr. et al.* (US Patent 5,915,245, hereafter “*Paterson*”). Reconsideration is respectfully requested.

The Applicant also apologizes for previous counsel’s typos with regard to the application number and Examiner’s name.

I. THE REJECTION OF CLAIMS 1-8 UNDER 36 U.S.C. § 103(A) AS OBVIOUS IN LIGHT OF WILSON AND PATTERSON

The Examiner rejected claims 1-8 under 35 U.S.C. § 103(a) as being unpatentable over *Wilson* in view of *Patterson*.

Claim 1: One crucial aspect of the Examiner’s rejection of claim 1 is the official notice taken that:

“... the steps of calculating for at least one recipient a latency dependent upon at least one recorded time when at least one message is sent to the recipient and at least one recorded time when a corresponding response is received from the recipient and displaying the latency for the recipient is old and well known in the art. These steps provide the user with the information about the status of the message and enable the user to route the message to the recipient who is best able to handle the message in a timely manner.”

Office Action at p. 3.

The Applicant strongly disagrees with the validity of taking official notice for this subject matter. Per MPEP § 2144.03, the Applicant traverses the Examiner’s statement that the subject matter of the official notice is old and well known, or that this subject matter is proper for official notice at all. The Applicant demands, per MPEP § 2144.03, that the Examiner cite a reference in support of his position.

Official notice may be taken only of facts that are capable of “instant and unquestionable demonstration.” *Id.* For example, in addressing judicial notice, the CCPA (the ancestor to the Federal Circuit) stated:

“Assertions of technical facts in areas of esoteric technology must always be supported by citation to some reference work recognized as standard in the pertinent art and the appellant given, in the Patent Office, the opportunity to challenge the correctness of the assertion or the notoriety or repute of the cited reference. Allegations concerning specific ‘knowledge’ of the prior art, which might be peculiar to a particular art should also be supported and the appellant similarly given the opportunity to make a challenge.”

In re Ahlert, 165 USPQ 418, 420-21 (CCPA 1970) (citations omitted) cited at MPEP § 2144.03.

Similarly, the CCPA has stated that:

“Moreover, we reject the notion that judicial or administrative notice may be taken of the state of the art. The facts constituting the state of the art are normally subject to the possibility of rational disagreement among reasonable men and are not amendable to the taking of such notice.”

In re Eynde, 178 USPQ 470, 474 (CCPA 1973) cited at MPEP § 2144.03.

The idea of latency, as explained in the application, with its various claimed aspects, is thus not suitable for official notice.

Official notice for the idea of latency with its claimed aspects is especially inappropriate in the present case. Official notice is reserved for those facts that are capable of instant and unquestioned demonstration as being well-known. In contrast, portions of the background section of the application are devoted to an explanation of the need for a display of information helpful in identifying which markets are likely to execute orders more quickly than others. This is basically the same justification the Examiner provides as to why latency is present in the prior art. Clearly, the Applicant does not and would not agree that latency is in the prior art. *See*

MPEP § 2144.03 ("The facts so noticed . . . should not comprise the principle evidence upon which a rejection based.")

Turning to references cited by the Examiner, the Examiner cites to *Patterson* for the proposition that:

"Patterson teaches the steps of recording the time when each message is sent, recording for responses received from recipient of the first message the time when each response is received, wherein each response corresponds to a particular message (See Patterson Figures 1, 13, claims 1 and 8-12, Column 6 line 56 – Column 7 line 7, Column 9 line 2 – Column 10 line 9, Column 11 lines 7-16 and Column 12 lines 1-8)."

Office Action at p.3

However, nowhere in the passages cited by the Examiner in either *Patterson* or *Wilson* is it stated that the time when each response is received is recorded and displayed. This is not surprising when the purpose of *Patterson* and *Wilson* are considered. Neither of *Patterson* nor *Wilson* are directed toward a latency monitor, or a method of displaying latency, as recited in claim 1. This may be because neither *Wilson* nor *Patterson* addresses the issue of identifying which markets are likely to execute orders more quickly than others. Regardless, the failure of the Examiner to cited a reference that teaches latency is fatal to establishing a *prima facie* case of obvious.

Allowance of claim 1, and all claims dependent thereon, is respectfully requested.

Claims 2-8: Claims 2-8 also contain patentable subject matter.

The Applicant again traverses the Examiner's taking official notice of latency. The Examiner fails to cite any reference for latency as applied to a port. As disclosed in the specification, port latency may be used to determine the failure or less-than-optimal performance of a port.

The Examiner also fails to provide any reference that distinguishes between instant and average latency.

The Examiner further fails to provide a reference that teaches to display the number of messages sent to the market and the number of responses received from the market during the given time period.

Allowance of claims 2-8 is respectfully requested.

II. NEW CLAIMS 17-24

The Examiner is respectfully requested to Examine new claims 17-24. Allowance for each of these new claims is respectfully requested.

III. CONCLUSION

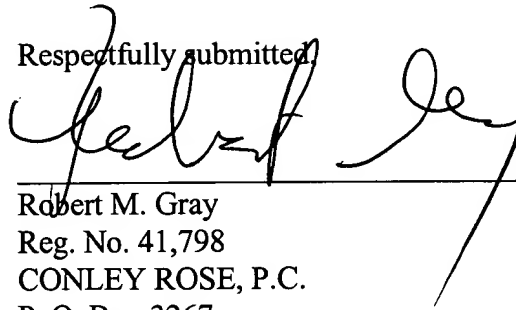
Applicants may have at times referred to claim limitations in shorthand fashion, or may have focused on a particular claim element. This discussion should not be interpreted to mean that the other limitations can be ignored or dismissed. The claims must be viewed as a whole, and each limitation of the claims must be considered when determining the patentability of the claims. Moreover, it should be understood that there may be other arguments with respect to patentability which have yet to be raised, but which may be raised in the future. The format of this Amendment and Response to Office Action is believed to conform with the Revised Amendment Practice as described in "Changes To Implement Electronic Maintenance of Official Patent Application Records," 68 Fed. Reg. 38611 (June 30, 2003).

All of the pending claims are believed to be free of the prior art, and reconsideration and withdrawal of the rejections are respectfully requested. If a telephone conference would facilitate the resolution of this matter, the Examiner is invited to telephone the undersigned representative.

Application No. 09/574,595
Amendment Dated January 5, 2004
Reply to Office Action of October 4, 2003

Should any fees have been inadvertently omitted, or if any additional fees are required or have been overpaid, please appropriately charge or credit those fees to Deposit Account Number 03-2769 of Conley Rose, P.C., Houston, Texas.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Robert M. Gray', is written over a horizontal line.

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